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QUESTIONS PRESENTED

1. Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing or afterwards, contrary to established state practice, and which were not passed upon by that court, are within this Court's jurisdiction.

2. Whether a long-established Alabama statute, which discourages frivolous and dilatory appeals by increasing the amount of money damages awarded in civil cases if the judgment is affirmed on appeal, is an irrational enactment in violation of the Equal Protection Clause.

3. Whether the Due Process Clause required one justice of the nine-member Supreme Court of Alabama to disqualify himself because he was the plaintiff in a case involving a similar cause of action but against a different insurance company in a different factual setting, when that case would not have been materially affected by the decision below, the case was instituted solely for the purpose of reforming the other insurance company's claim practices, the justice did not expect to and did not in fact receive a money judgment, and the case was settled with an accompanying stipulation wherein the other insurance company conceded that its claim practices generally were deficient and should be reformed.

4. Whether the Contract Clause applies to restrict decisions of state courts contrary to the explicit language of the clause, the expectations of the framers, and the consistent decisions of this Court.

5. Whether this Court should reverse two centuries of settled practice and law by applying the Eighth Amendment to civil proceedings, and whether a punitive damage award against Appellant for its egregious and intentional misconduct in denying Appellees' lawful insurance claim on four separate occasions, and then attempting to cover up this misconduct through dishonest means during sub-

sequent litigation, is excessive when the award compensates Appellees for the injuries caused by Appellant's tortious conduct, deters insurance companies from engaging in misconduct in the future, and provides insureds with an incentive to contest intentional misconduct which could otherwise go unremedied.

6. Whether the Due Process Clause prevents a state from recognizing a cause of action in tort, pursuant to the traditional common law method, for intentional misconduct by insurance companies in violation of their long-established legal duty of good faith and fair dealing towards their insureds.

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BRIEF OF APPELLEES

JURISDICTION

Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1257(2). Appellant did not raise its constitutional challenge to Ala. Code § 12-22-72 within the time limits permitted under Alabama procedure, and it was not ruled upon by the Supreme Court of Alabama. Similarly, Appellant's other federal claims were neither timely presented nor considered by the court below. In the absence of either timely presentation or consideration of the federal issues, this Court lacks jurisdiction.

COUNTERSTATEMENT OF THE CASE

The cynosure of this case is the gross misconduct by Appellant Aetna Life Insurance Co. and its employees which caused a civil jury to assess $3.5 million in punitive damages, and persuaded both the trial court and the Supreme Court of Alabama to uphold the verdict. As fully revealed in the Alabama court's detailed findings of fact, J.S. App. 1a-40a,[1] which must be regarded as conclusive upon appeal, numerous Aetna personnel knowingly assembled a mosaic of deceptions, evasions and outright lies during the course of Appellant's four separate decisions to deny Appellees' insurance claim and then to contest this claim, which they knew had been unlawfully denied each time, in state court. Moreover, these personnel acted repeatedly and knowingly in violation of Appellant's own internal procedures: they did not secure review by Appellant's medical staff prior to acting upon the claim; they failed to obtain essential medical documents; and they ignored evidence demonstrating the validity of the claim. All of this occurred at a time of serious financial distress for Appellees.

Appellees Margaret and Roger Lavoie are husband and wife. Mrs. Lavoie was retired at the time of her hos-

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[1] "J.S. App. ——" refers to the appendix to Appellant's jurisdictional statement. "J.A. ——" refers to the Joint Appendix.

pitalization, and Mr. Lavoie was a former police officer who had retired on disability from a brain tumor. They were insured under a group hospitalization policy sold by Appellant to the City of Mobile. Mrs. Lavoie was admitted to the Mobile Infirmary Hospital on February 3, 1977 on the recommendation of her personal physician, Dr. John B. Douglas. Mrs. Lavoie, who had a known history of chronic ulcerative colitis, had been experiencing lower back pain, osteoarthritis, and bright red bleeding from the bowel area. Dr. Douglas also observed that Mrs. Lavoie exhibited unusual personality changes and appeared to have flight of ideation.

Mrs. Lavoie remained in the hospital for 23 days, during which time Dr. Douglas or his partner ordered diagnostic tests for Mrs. Lavoie, including an electroencephelogram (EEG), an electrocardiogram (EKG), a gastrointestinal series (GI series), a barium enema, and a computer assisted tomogram (CAT scan). The total bill for Mrs. Lavoie's treatment, hospitalization and tests amounted to $3,028.25, of which Appellant paid only $1,378.03. The remaining amount of $1,650.22—representing the charges for Mrs. Lavoie's diagnostic tests and room and board at the hospital—was subject to four administrative reviews by Appellant, each resulting in denial of payment on the purported grounds that Mrs. Lavoie could have been treated on an out-patient basis and that these tests were not "usual and customary procedures" for a patient with Mrs. Lavoie's symptoms. The record reveals, and Appellant knew, that Dr. Douglas believed these tests and Mrs. Lavoie's hospitalization were medically necessary to determine whether Mrs. Lavoie suffered from abdominal and/or intracranial disease in light of her symptoms.

It is no longer at issue in this case that the refusal to pay the Appellees' claim was unlawful. Appellant had no sound basis for each denial, and its attempt at trial to fashion a *post hoc* justification for its action was properly rejected by the jury. Similarly, Appellant can-

not now dispute the findings of the Alabama courts of its outrageous misconduct while processing and subsequently litigating Appellees' claim which justified a punitive damage award of $3.5 million for the intentional tort of bad faith failure to pay a legally owed insurance claim.

As the Supreme Court of Alabama found, Appellant provided as a matter of basic internal procedure that its personnel must solicit the opinion of its medical staff prior to acting upon disputes involving medical judgment. Yet Appellant knowingly violated this rule by denying Appellees' claim on three successive reviews without first consulting with its medical staff. Compounding this misconduct, Appellant on two occasions knowingly misrepresented to the Lavoies that the denial was based upon prior consultation with the medical staff.

Appellant subsequently attempted to cover up these knowing misrepresentations, and was exposed for doing so at trial. In an affidavit submitted in an effort to have summary judgment entered against the Lavoies, the responsible employee in Appellant's Mobile office, Brenda Harris, attempted to rationalize the two incorrect statements by claiming that she regarded her prior consultation with claims examiners in the Home Office in Hartford, Connecticut as generally involving Appellant's medical staff. At trial, however, Harris admitted under oath that she knew these examiners were not medical personnel or part of Appellant's medical staff. Appellant's knowing efforts to distort facts to avoid any liability thus extended beyond its insureds to the Alabama courts —a fact which was known to the jury.

Appellant also failed to observe its internal rules requiring all decisions on medical claims to be based upon a complete medical dossier. Appellant failed to obtain Mrs. Lavoie's hospital progress notes and records, which its personnel conceded were highly probative documents, at any time during the four reviews. Indeed, the nurses' notes, admittedly an integral part of Mrs. Lavoie's medi-

cal records, were obtained only in April, 1978, after the third denial.

Moreover, when Appellant belatedly did submit the claim to its own medical staff, the two most important medical documents—letters from Dr. Douglas explaining the medical necessity for Mrs. Lavoie's hospitalization and diagnostic tests—were omitted from the file. In an effort to cover up this mishandling, the member of the medical staff involved, Dr. Swan, testified at trial that he had nevertheless reviewed "the letter" from Dr. Douglas and concluded that it did not justify the hospitalization or tests ordered for Mrs. Lavoie. In fact, the Supreme Court of Alabama found that Dr. Swan's earlier affidavit plainly revealed that he had never once reviewed either or both of Dr. Douglas' letters, which Doctor Swan admitted were the "most important" data in the file. J.S. App. 19a.

A further misrepresentation to the court was revealed in the testimony of Thomas Hutton, a Home Office claims examiner. In a pre-trial deposition, Hutton claimed that he had reviewed the Lavoie file sometime in 1978, discussed the file with Doctor Swan, reviewed the nurses' notes, and submitted Doctor Douglas' letters to Doctor Swan. At trial, however, Hutton admitted that he in fact had never reviewed the Lavoie file after December 20, 1977, thereby demonstrating that the 1978 activities he testified to under oath were mere fabrications.

Appellant's personnel also engaged in plainly disingenuous behavior by soliciting material from the hospital which they had no intention of considering. On March 24, 1977, Brenda Harris requested certain documents from the hospital relevant to the Lavoies' claim. Less than two weeks later and before receiving any response to her letter, Harris forwarded the incomplete file to the Home Office along with her recommendation to deny payment of the claim. After receiving the Home Office's concurrence, Harris then notified the Lavoies for the first time on June 3, 1977 that Appellant would not pay the claim,

still without having received the documents requested from the hospital.

Relatedly, Appellant's personnel at no time gave serious consideration to Dr. Douglas' medical opinion which they had solicited. In response to the denial of June 3, 1977 and Appellant's earlier inquiries, Dr. Douglas drafted the first of two letters detailing the medical necessity of Mrs. Lavoie's hospitalization and tests in light of her symptoms. In a letter to the Lavoies dated November 14, 1977, Harris, without consulting Appellant's medical staff, found Dr. Douglas' explanation inadequate and invited the Lavoies to supply "further information" from Dr. Douglas. Dr. Douglas then drafted his second letter restating the need for hospitalization and tests for Mrs. Lavoie. In a letter dated December 3, 1977 and containing the knowing misrepresentation that she had checked with the medical staff, Harris again rejected Dr. Douglas' opinion as inadequate. Harris' glib reiteration in this letter that Appellant "would be most happy to consider" any further information from the Lavoies was both misleading and dishonest in light of Appellant's failure to accord serious consideration to Dr. Douglas' letters and Harris' knowing misrepresentation to the Lavoies regarding the type of consideration in fact given.

Further, Appellant's gross mistreatment of Appellees stemmed in part from its perception that they probably would not pursue their claim in court. In response to Dr. Douglas' first letter, Thomas Hutton advised Brenda Harris to maintain the position denying the Lavoies' claim unless "they act like they are going to file suit," J.S. App. 7a, in which case Hutton wanted the file sent back to him for reconsideration. This remark graphically demonstrates what the Alabama courts found to be characteristic of Appellant's claims procedure—a policy not of fairly paying legitimate claims, but instead of pressuring insureds in a position of weakness to accept less than their due.

Faced with this "overwhelming" evidence of bad faith, J.S. App. 12a, it took the jury only 50 minutes to reach a decision awarding Appellees punitive damages for Appellant's tortious conduct. The trial court which heard the testimony denied Appellant's motion for a j.n.o.v. or, alternatively, for remittitur. The Supreme Court of Alabama held that "the record is replete with evidence that at no time did Aetna review the claim in good faith, consider all the facts available to it and comply with its own established rules and procedures." J.S. App. 13a. The court further concluded on the basis of this record that "the dark shadows of fraud and conspiracy enveloped each and every aspect of Aetna's actions regarding the handling of the Lavoie claim from the instance of the first denial and continued throughout the trial itself." J.S. App. 35a. It stated that "[t]here is a plethora of . . . places in the record of testimony and exhibits from which the only conclusion a reasonable person could draw is that Aetna, through its employees, was guilty of fraud, bad faith, and unfair dealing, had a dishonest purpose, and was motivated by self interest and ill will." J.S. App. 22a.

SUMMARY OF ARGUMENT

I.

This Court lacks jurisdiction over this case because no federal issue was either timely presented to or passed upon by the Alabama courts. Not only were no federal issues presented during the trial and three appeals of this case, there was no mention of any such issues in Appellant's application for rehearing as well. The first presentation of any federal issue was in a later brief in support of rehearing. Other issues were not even raised then, but appeared later in a series of unauthorized pleadings.

This Court and the Supreme Court of Alabama have held that it is improper to raise issues at the rehearing stage and that this Court cannot consider these improp-

erly made arguments. Further, there was no "surprise" to Appellant in the decision below which Appellant claims for the first time occasioned the arguments it seeks to present.

II.

Ala. Code § 12-22-72 represents a rational exercise of the judgment of the Alabama legislature. The purpose of the statute is to deter dilatory and unmeritorious appeals and to provide additional damages to those whose collection of a judgment is delayed, both legitimate state objectives. The Alabama legislature rationally concluded that the danger of dilatory appeals was greatest with those who owed money judgments. Numerous other state and federal statutes rely on similar distinctions and have been routinely upheld under the Equal Protection Clause.

III.

The participation of Justice Embry in the deliberations of the nine-member Alabama court satisfied constitutional standards. The litigation in which he was involved was settled with a stipulation that the purpose of the suit was not to obtain a monetary award. Further, the decision below did not change Alabama law at all, a point not disputed by the dissenting justices. Justice Embry thus had no prohibited direct interest in the outcome of the case.

Nor was Justice Embry disqualified for bias. There is no evidence of any bias in his participation in the Alabama court's proceedings. His deposition, relied on by Appellant, reveals no fixed disposition against insurance companies in general, much less a personal bias against Appellant. The views of an appellate judge on the law are not matters going to the judge's qualifications.

IV.

The Contract Clause of the Constitution, contrary to Appellant, does not apply to decisions of state courts. This Court, in a long line of decisions, has held that the

clause applies only to actions of state legislatures. The history of the clause's adoption, as well as the use of the operative word "pass," confirm that judicial decisions are not within the scope of the restriction.

V.

The Eighth Amendment does not apply to this proceeding. It is limited to criminal penalties, while the Alabama courts here imposed civil damages. Appellant identifies no constitutionally required procedures it was denied. Punitive damages have long been recognized as a civil penalty and their imposition by both state and federal courts in numerous settings has been routinely upheld. The award in this case was not excessive in view of Appellant's egregious misconduct, its financial resources, the differences in position between Appellant and its insureds of which Appellant sought to take advantage, and in light of the deterrent purpose of awarding punitive damages.

VI.

The punitive damages award did not violate the Due Process Clause. Contrary to Appellant, the standards for awarding such damages and the protections against excessive judgments are well established. Further, the duty of Appellant towards its insureds which the Alabama courts found had been violated is one of long standing. The development of the tort of bad faith denial of claims began long before Appellant's conduct which led to the decision on review. Appellant thus knew it had a duty to its insureds and points to no reasonable cause for any expectation on its part that it could flagrantly violate its own procedures to the detriment of its insureds and suffer no loss. The course Appellant urges—substantive review of a state tort damages award—is unduly intrusive on a matter wholly of state law and would make this Court the arbiter of every substantial damages award.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS CASE

This appeal should be dismissed. None of the federal questions which Appellant argues were timely presented to, or actually ruled upon by, any Alabama court. In construing Section 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, Justice Story wrote: "it has been uniformly held that to give this court jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the same court . . . ." *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 390 (1836);[2] *see Illinois v. Gates*, 462 U.S. 213 (1983); 16 C. Wright, A. Miller, E. Cooper & E. Gressmen, *Federal Practice and Procedure* § 4022 (1977). Appellant's burden is to show that the issues it brings to this Court were timely and properly presented in the Alabama courts. *See Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942). The earliest any of the federal issues now presented was raised before the Alabama courts was in Appellant's brief in support of its application for rehearing below. Since the Alabama court was under no obligation to rule on new issues raised then or later, and did not do so, this Court lacks jurisdiction and the case should be dismissed.

A. The Affirmance Statute

Appellant's constitutional attack on Ala. Code § 12-22-72 was first made in its brief in support of its application for rehearing before the Supreme Court of

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[2] Appellant's reliance on *Crowell* (Br. at 11) is misplaced. The language quoted by Appellant was from the Court's conclusion and did not, even in *dicta*, deal with the question of whether the Court has jurisdiction over issues not properly presented or considered. The conclusion pressed by Appellant is directly contrary to the holding of *Dewey v. City of Des Moines*, 173 U.S. 193 (1899).

Alabama, which Appellant had received permission to file one week after the underlying application. J.S. App. 79a. No mention of this issue was made in the application. Recognizing that this was improper,[3] Appellant filed an amendment to its application to add a general constitutional issue. J.A. 51. Ala. R. App. P. 40, however, does not provide for any extension of the 14-day period for filing applications for rehearing. And while extensions of that period by motion for good cause are not barred by Ala. R. App. P. 26(b), Appellant neither filed such a motion nor indicated any grounds for an extension. Thus, Appellant did not comply with Alabama procedure.[4]

In any event, the Alabama courts do not permit new questions to be presented on rehearing.[5] In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), this Court acknowledged that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." And "[q]uestions first pre-

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[3] In this situation, the Supreme Court of Louisiana held that an extension of time for the brief on rehearing "does not give [counsel] the right to raise issues therein that had not heretofore been made in his application for rehearing." Gautreaux v. Harang, 190 La. 1060, 183 So. 349, 374 (1938); *see* Lomenick v. Hartford Accident & Indem. Co., 189 So. 2d 731 (La. App. 1966). Appellant (Br. at 12 n.1) refers to Ala. R. App. P. 20, which did away with the requirement of assignments of error in connection with the filing of briefs on appeal. Ala. R. App. P. 40, however, which governs rehearing, continues to require a separate application for rehearing with a supporting brief which hews to that application.

[4] In addition, when a state statute is challenged as violating the Constitution, Ala. Code § 6-6-27 requires service of the relevant pleadings on the Alabama Attorney General. Appellant failed to comply with this requirement.

[5] "An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered." Kirkland v. Kirkland, 281 Ala. 42, 198 So. 2d 771, 777 (1967); *see* Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251 (Ala. 1985); Lovett v. Uptain, 450 So. 2d 113, 116 (Ala. Civ. App. 1983), *aff'd*, 450 So. 2d 116 (Ala. 1984).

sented to the highest State court on a petition for rehearing come too late for consideration here . . . ."[6]

Appellant is wrong in suggesting (Br. at 13) that it would have been improper for it to have asserted its arguments concerning § 12-22-72 in its brief on appeal. Parties have raised such issues and the Alabama court has considered them prior to rehearing. *See, e.g., Air Movers of America, Inc. v. State National Bank*, 293 Ala. 312, 302 So. 2d 517, 533 (1974). Moreover, that the Supreme Court of Alabama has on rare occasions considered such arguments on rehearing[7] does not permit invocation of this Court's jurisdiction in a case where the court did not do so. In *Orr v. Orr*, 440 U.S. 268 (1979), the constitutional claim was first presented on appeal, but was considered by the Alabama court without objection. This Court noted that:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

Id. at 274. The Court emphasized that its conclusion "does not preclude any other State, *or even Alabama in*

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[6] Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 at 701 (1977).

[7] The 17 cases cited by Appellant where the court considered the application of the affirmance statute on rehearing do not indicate a different practice. Eleven of these involved rehearing sought by the appellee asserting the failure of the court to perform the ministerial act of applying the statute. The 11 cases are cited in Appellees' Motion to Dismiss at 8-9 n.6. *Lawrence v. Jones*, 37 Ala. 388 (1861), did not involve rehearing at all, but instead a second appeal claiming that the original judgment had been misinterpreted on remand. It thus has no bearing whatever on the Alabama court's practice on rehearing. In only four cases did the court consider arguments concerning the affirmance statute raised by appellants after judgment, and two of these involved questions of statutory construction never before considered. Motion to Dismiss at 9. The two remaining cases are hardly an indication that the Alabama court regularly considers such late-raised questions.

another case," from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275 n.4 (emphasis added). Since Appellant's constitutional argument was not properly raised and the court did not address it, Appellant has not established the jurisdictional basis for an appeal to this Court.

B. The Allegations Concerning Justice Embry

Appellant's contentions concerning Justice Embry were not presented until more than two months after the decision of the Supreme Court of Alabama in Appellant's motion to disqualify filed February 21, 1985 (J.S. App. 85a), and in its second application for rehearing filed March 22, 1985 (J.S. App. 132a). Since these pleadings were filed wholly outside the scope of the Alabama rules, the Alabama court was under no duty to consider Appellant's request at all. In denying the motion to disqualify, the court gave no indication that it had reached the constitutional question belatedly pressed by Appellant.

Appellant did not attempt to explain why it could not have discovered the relevant facts before more than a year had passed after the filing of the two suits by Justice Embry.[8] Instead, Appellant rests its claim (Br. at 14) on the assumption that the court in fact rendered

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[8] In *Pierce v. Tharp*, 224 Tenn. 343, 461 S.W.2d 950, 953-54 (1970), *cert. denied*, 402 U.S. 929 (1971), one of the parties to a proceeding before the Supreme Court of Tennessee charged, months after the court's decision, that two of the justices were disqualified. The court held that the objection was waived.

> "The matters now brought forward in the petition . . . could have been investigated during the five months waiting period [before oral argument]. But petitioners preferred to rest on their oars until the Court announced its decision, and then come forward with a belated effort to charge that some of the justices on the Court were disqualified to hear the case. If any member of the Court were disqualified to participate in the hearing, such incompetency was waived by failure of petitioners or movents to make objection in limine on the hearing and petitioners are conclusively presumed to have consented to his or their participation in the hearing."

a judgment upon the constitutional issues in rejecting the motion. The Court's order, however, is silent as to any constitutional issues, merely reciting that no justice concluded he was disqualified. J.S. App. 64a. Where the highest state court does not address a federal question, it will be assumed that the omission was caused by the lack of proper presentation. *Exxon Corp. v. Eagerton*, 462 U.S. at 181 n.3. And even if a state court passes on state questions raised on rehearing, but not federal questions, the federal issues may not be presented in this Court. *Fullerton v. Texas*, 196 U.S. 192 (1905). Thus, Appellant's constitutional arguments concerning Justice Embry's qualifications were not properly presented below and cannot be considered by this Court.

C. The Contract Clause and Excessive Fines Clause Questions

Appellant makes no effort to contend that either of these issues was timely raised under Alabama procedure.[9] The extreme tardiness of their presentation was certainly not within any construction of proper procedure in Alabama.

Appellant contends that it was "surprised" by the decision below, and that its failure to raise these issues is thus excused under the doctrine of *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the Court held that late-presented federal issues may be considered when they arise as the result of an unexpected and unanticipated holding by the state court. Appellant's arguments, however, do not fall within this exception. The Supreme Court of Alabama here affirmed the judgment of the trial court. And while Appellant contends that it did not expect that the judgment would be affirmed, it does not explain how the

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[9] The Contract Clause issue was not mentioned until Appellant's motion for disqualification on February 21, 1985 (J.S. App. 87a), and was thus in direct violation of Ala. R. App. P. 40 which prohibits successive applications for rehearing. The Eighth Amendment issue was raised initially in Appellant's late-filed brief on rehearing.

rationale employed by the court for the first time created an opportunity to argue that the Eighth Amendment and the Contract Clause had been offended. Appellant's decision not to present those federal issues to the Alabama court was one of tactics or oversight, and the failure of that decision is not the sort of "surprise" contemplated in *Brinkerhoff*.

Finally, Appellant's analysis of the prudential concerns relating to jurisdiction is erroneous.[10] Appellant suggests that if a state court refuses to consider improperly and untimely raised issues, it no longer is entitled to "the proper respect for state functions" that is essential to our federal system. *Younger v. Harris*, 401 U.S. 37, 44 (1971). This argument would deny reasonable state procedural rules any validity and would encourage litigants, such as Appellant, who lose in state courts to then conjure up federal issues as part

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[10] Appellant suggests that in the absence of certain prudential factors the Court may dispense with the requirement that a federal issue must have been raised in the state court. While it is true that this Court's decisions have cast some doubt on the jurisdictional nature of this requirement, *compare* Wood v. Georgia, 450 U.S. 261 (1981) *with* State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945), the requirement should be viewed as absolute. The Constitution (art. III, § 2, cl. 2), states that except for cases under this Court's original jurisdiction, "the supreme Court shall have appellate jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." Section 25 of the Judiciary Act of 1789 was construed by this Court to absolutely bar appeals from state courts where the federal issue was not timely raised and considered. *E.g.*, Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836). The statute governing appeals from state courts was repeatedly reenacted without significant change, with the last reenactment occurring in 1948. Judicial Code and Judiciary Act, ch. 646, 62 Stat. 929 (1948) (codified as 28 U.S.C. § 1257). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." Lorillard v. Pons, 434 U.S. 575, 580 (1978); *see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982). Appellants here, therefore, may not proceed on the basis of a supposed absence of prudential concerns.

of a last-ditch effort to avoid liability or to cause delay. In *Webb v. Webb*, 451 U.S. 493, 501 (1981), the Court required that "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law" (emphasis in original). Appellant did not come even close to satisfying this standard.

II. THE ALABAMA AFFIRMANCE STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Ala. Code § 12-22-72 provides that in cases where a trial court judgment awarding money is affirmed on appeal, the appellate court will increase the judgment by ten percent. This statute does not impose any classification based on invidious factors such as race, nor does it affect any fundamental right. As the Court held in *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), litigants have no absolute right to any appellate review. Although states do not have an unfettered right to place restrictions on rights of appeal they do grant, state procedures must be upheld if they are rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985); *Lindsey*, 405 U.S. at 78. In making this analysis, such state actions are given wide latitude and are presumed to be valid. *Cleburne*, 105 S. Ct. at 3254.

The purpose of § 12-22-72 is to discourage frivolous and dilatory appeals, *see Chapman v. Rivers Construction Co.*, 284 Ala. 633, 227 So. 2d 403, 415 (1969), and "to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered," *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174, 180 (1950). These interests are legitimate since Alabama clearly may act to discourage insubstantial appeals which burden the legal system and to encourage prompt payment of judgments. *See Lindsey*, 405 U.S. at 78. Appellant does not dispute this.

Parties who owe a judgment have every incentive to delay payment by filing an appeal, regardless of its merits. And the incentive to prosecute even a seemingly dilatory appeal increases with the size of the judgment since the marginal cost of additional legal fees becomes quite small compared to the judgment. For losing plaintiffs, however, having already expended the cost for a trial, the further fees required for an appeal are a sufficient disincentive to taking an unmeritorious appeal. Moreover, while delay in payment of judgments extends the time before an injury is redressed, no comparable policy applies with respect to losing plaintiffs. The statute thus is rationally related to the policies it is intended to promote.

Appellant argues (Br. at 21) that the Alabama statute is analogous to the double bond requirement struck down in *Lindsey*. In that case, however, no legitimate state interest was advanced for a bonding requirement which distinguished landlords from tenants. Indeed, there the bonding requirement was placed on those least able to meet it—tenants—and seemed designed to simply foreclose access to an appeal. The Alabama statute instead is directed specifically at parties with an incentive to cause delay.[11]

This Court upheld an identical statute in *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261, 263 (1916), on these grounds. Justice Holmes wrote:

> "The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas,

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[11] Appellant argues that the existence of Ala. R. App. P. 38 (patterned after Fed. R. App. P. 38) demonstrates that § 12-22-72 is irrational. However, Rule 38 extends to situations not reached by the statutory penalty, including cases where frivolous appeals are taken by plaintiffs, or in cases which do not involve money judgments. Moreover, Appellant was not assessed any liability under Rule 38, thus making this rule irrelevant to Appellant's claim under the Equal Protection Clause.

> and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld."

Where legislatures have made distinctions similar to those made by § 12-22-72, the statutes have been found to reflect a rational balancing of competing interests. In *Empire State Insurance Co. v. Chafetz*, 302 F.2d 828, 830 (5th Cir. 1962), the court denied an Equal Protection Clause challenge to a statute which provided for the award of attorneys' fees in favor of insureds, but provided no similar relief for insurance companies, relying on this Court's decisions in *Life and Casualty Insurance Co. of Tennessee v. McCray*, 291 U.S. 566 (1934), and *Farmers' and Merchants' Insurance Co. v. Dobney*, 189 U.S. 301 (1903). *See Postow v. OBA Federal Savings & Loan Association*, 627 F.2d 1370, 1386-88 (D.C. Cir. 1980) (upholding provision in Truth in Lending Act awarding attorneys' fees only to borrowers).

Indeed, statutes which impose affirmance penalties only on those against whom a judgment was entered are common. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2106; Ga. Code Ann. § 5-6-6; Or. Rev. Stat. § 19.160. Mississippi and Virginia have enacted affirmance statutes which are substantially identical to the Alabama statute. Miss. Code Ann. § 11-3-23; Va. Code § 16.1-113.[12] Finally, the Eleventh Circuit has imposed the Alabama statute in diversity cases, apparently assuming that it is constitutional. *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2704 (1985); *Locke v. Allstate Insurance Co.*, 696 F.2d 1340 (11th Cir. 1983).

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[12] The courts of those states have found that the purpose of these statutes is to discourage frivolous appeals and to compensate holders of judgments. *See* Canal Bank & Trust Co. v. Brewer, 147 Miss. 920, 114 So. 127 (1927); Nationwide Mut. Ins. Co. v. Tuttle, 208 Va. 28, 155 S.E.2d 358 (1967).

Essentially, Appellant argues that the Alabama statute would be better taken if it were more limited. But the Alabama legislature concluded that the statute should apply automatically, perhaps believing that the deterrent effect on non-meritorious appeals would be greater and the burden on the courts of enforcing the penalty would be less. Whether that is so is the business of the legislature. As the Court held in *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955),

> "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

III. JUSTICE EMBRY'S PARTICIPATION DID NOT DEPRIVE APPELLANT OF DUE PROCESS

At the time this case was under consideration by the Supreme Court of Alabama, Justice T. Eric Embry, a member of the court's majority and apparently the author of the court's opinion, was the plaintiff in a putative class action suit against a different insurer, Blue Cross and Blue Shield of Alabama, which alleged a pattern of improper and bad faith denials of insurance claims.[13] As will be discussed *infra*, that suit was dismissed by stipulation of the parties without payment of any sum.[14]

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[13] Another suit involving a claim by Justice Emby, *Embry v. Maryland Cas. Ins. Co.*, DV 84-963 (Jefferson Cty. Dist. Ct.), was settled almost immediately upon the filing of the complaint when the insurer agreed to pay the claim. Those proceedings had terminated on April 6, 1984, before the oral argument or the decision in this case.

[14] Although the class action suit was dismissed on April 16, 1985, Appellant did not reveal this fact in its Reply Memorandum filed May 14, 1985, or in its brief (apart from the docket sheet appended to the brief). The fact that Appellant continued to argue the effect of the Blue Cross suit after it knew that it had been dismissed and the circumstances of the dismissal (*see infra* pp. 21-25) is unfortunately similar to the series of misrepresentations resorted to by Appellant below (*see supra* pp. 1-6) which resulted in the punitive damage award.

Without pointing to anything in the opinion or proceedings of the court below which evidences improper bias on the part of Justice Embry, Appellant relies on the mere existence of the suit and a few out-of-context remarks by Justice Embry in a deposition to claim that his participation in the nine-member court's consideration of the case deprived it of due process and, further, that any remaining members of the court who did not remove themselves from the plaintiff class must also be disqualified from considering the case on remand.[15] Despite Appellant's arguments, Justice Embry's lawsuit did not require his disqualification or, by extension, the disqualification of the other justices of the Alabama court.

A. Questions as to the Qualifications of a Justice of a State Supreme Court Are Limited and Should be Left to the Discretion of the Justice

Since this case arises from a state court, this Court's review is limited to determining whether there has been a constitutional violation, as opposed to deciding whether Justice Embry's role conflicts with standards set by statute or by a court's supervisory powers. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), the Court explained that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." The Court in *FTC v. Cement Institute*, 333 U.S. 683, 702

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[15] This is a different position than that taken by Appellant in its Jurisdictional Statement (at 9 n.2) where it stated that it "does not bring to this Court the question of whether the membership of the eight other Justices . . . in the putative class . . . [is] sufficient to disqualify those Justices under the Due Process Clause . . . from future participation in this case on remand . . . ." Having specifically set aside any question relating to the members of the court other than Justice Embry, Appellant cannot add an issue concerning them now. *See* Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376, 386 n.12 (1960). In any event, since the case has been settled, there can be no question about the qualifications of the remaining justices.

(1948), again emphasized that "most matters relating to judicial disqualification did not rise to a constitutional level." *See also United States ex rel. Perry v. Cuyler*, 584 F.2d 644, 645 (3d Cir. 1978), *cert. denied*, 440 U.S. 925 (1979).[16]

In addition, the standard for reviewing Justice Embry's decision on his qualifications as an appellate judge is different from review in the situation of a trial judge's decision not to recuse himself. The American Bar Association Standards Relating to Appellate Courts (1977) recognize this distinction. The Commentary to § 3.42 notes that while a trial judge's decision on his own qualifications is subject to review by other judges,

> "[i]n the case of an appellate judge . . . that procedure would subject the judge to decision of his disinterestedness by official peers with whom he may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's 'bias' is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself.
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> "In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discre-

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[16] As the commentators have noted, the practices of the states as to judicial disqualification vary widely. Some allow parties to require the recusal of a judge almost on request, and others instead set a high standard for disqualification. *See, e.g.*, Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43, 65-66 (1970); Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 608-09 (1947). The differentiation between constitutional and statutory standards, therefore, appropriately recognizes the wide divergence in state practice.

> tion reposing in a trial judge . . . . Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views." [17]

In the absence of an extreme abuse of discretion, therefore, the decision on Justice Embry's qualifications to participate in this case was one for him to make.[18]

B. Justice Embry Had No Prohibited Interest in the Outcome of This Appeal

Justice Embry's lawsuit against Blue Cross gave him no direct interest in the outcome of this suit against Appellant, a different insurer, involving different claims and different facts. The overlapping interests Appellant identifies (Br. at 23-24) are either nonexistent or so remote and contingent as to pose no reasonable question about Justice Embry's qualifications.

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[17] *See* Ellis v. Minneapolis Commission on Civil Rights, 295 N.W.2d 523, 525 (Minn. 1980). Pointing out the same concerns in *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897 (1945) (Jackson, J., concurring), Justice Jackson concluded that "[t]here is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case." *See also* Nadelmann, *Disqualification of Constitutional Court Judges for Alleged Bias?* 52 Judicature 27, 28 (1968). In *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J.), the motion to recuse was decided solely by Justice Rehnquist.

[18] This entire dispute is occasioned by the existence of Ala. Code § 12-2-14, which authorizes the appointment of special justices in the event disqualifications result in an even-numbered court which is evenly divided on a matter. In a similar case arising in this Court, of course, even without the ninth justice's participation, the judgment would have been affirmed by the vote of the remaining justices. *See, e.g.*, Kissinger v. Halperin, 452 U.S. 713 (1981) (per curiam). Appellant's due process claim thus seems particularly dubious, given that it would have no claim at all but for Alabama's unique statute.

As noted above, Justice Embry's suit was dismissed by stipulation among the parties. The stipulation, agreed to by Blue Cross and Justice Embry, states that

> "[t]he primary objective of the institution of this suit . . . was to emphasize to defendant Blue Cross . . . that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. *Blue Cross recognizes that some problems have occurred in the past* and is determined to minimize them in the future." [19]

Blue Cross conceded the inadequacy of the procedures complained of, including a practice of denying claims without any determination of whether information sufficient to process the claim was already in the insurer's files. The stipulation does not indicate that any damages, actual or punitive, were paid. It is apparent from this judicially approved stipulation that Justice Embry's goal in the litigation with Blue Cross was reform of its payment system, not pecuniary gain to himself. Whatever result was reached on the specific facts of Appellees' claim, which did not include a contention that Appellant did not search for information in its possession needed to process their claim, thus had no bearing on the outcome of Justice Embry's suit.

The argument that the decision below changed the law in Alabama in a manner beneficial to Justice Embry is simply wrong. Contrary to Appellant, the Alabama courts have never regarded either partial payment of a claim or the presence of an issue which would prevent a directed verdict on the contract claim as an absolute bar to recovery for bad faith denial of claims. They are, rather, no more than rebuttable evidentiary presumptions.[20] And

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[19] Stipulation for Dismissal ¶ 1, Embry v. Blue Cross and Blue Shield of Alabama, Civ. Act. No. CV-84-500-447-JDC (Jefferson Cty. Cir. Ct., filed April 16, 1985) (emphasis added). The stipulation is reproduced in the Appendix to this brief.

[20] The case relied on by Appellant for its assertion of an absolute defense of partial payment is *Sexton v. Liberty Nat'l Life Ins. Co.*,

the Alabama court's decision here emphasized that its holding was based on the facts before it: "Clearly, then, under the evidence *in this case*, the 'directed verdict on the contract claim' test is inapplicable because this is not the ordinary or normal case." J.S. App. 22a (emphasis in original); *see* J.S. App. 12a. Thus, the decision below did not change the state of the law of bad faith in Alabama (a point not disputed by even the four dissenting justices),[21] and the court's emphasis on the particular facts

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405 So. 2d 18 (Ala. 1981). In *Sexton*, the partial payment was considered evidence of a lack of bad faith, but the court expressed no rule that partial payments would bar a finding of bad faith. Even Appellant concedes (Br. at 4), somewhat differently from its characterization at p. 23 of its brief, that *Sexton* only seemed to *generally* preclude liability. *See also* Brief of American Council of Life Insurance, *et al.*, at 4 n.6. The decision below did not change any rule announced in *Sexton* or elsewhere; it merely rejected Appellant's erroneous characterization of the *Sexton* holding. Even Justice Maddox in his dissenting opinion did "not suggest that partial payment . . . would preclude a finding of bad faith . . . ." J.S. App. 62a; *see* J.S. App. 32a-33a.

Similarly, with respect to the directed verdict requirement, the source of the purported rule is *National Sav. Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982). The court's discussion of the issue began with "[i]n the *normal case*" (*id.* at 1362), emphasizing that cases outside the norm might be different. Moreover, in *Safeco Ins. Co. v. Sims*, 435 So. 2d 1219, 1223 (Ala. 1983), the court specifically held that "the finding of justiciable controversy is not the determining factor . . . ." This point was emphasized in Justice Jones' concurring opinion. *Id.* at 1224-25. In the decision below, Chief Justice Torbert's dissenting opinion also did not disagree with the majority on this point—"a blind adherence to the directed verdict rule would essentially abolish the tort." J.S. App. 54a.

[21] The other two claimed effects, Br. at 23-24, are even more farfetched. The effect of the affirmance of a large punitive damage award in one case on the basis of a record which showed repeated, wholly improper denials of a claim and then further misrepresentations designed solely to avoid liability, on another case not involving those facts is totally speculative. Particularly in this case, where Justice Embry was not anticipating a monetary award but instead a revision of Blue Cross procedures, the contention is entirely unwarranted. And since the tort of bad faith denial of an

in this case belies any thought of Justice Embry that it could affect his case.[22]

If the final stipulation is any indication, Justice Embry did not anticipate any monetary award on a bad faith claim from the Blue Cross suit and, unlike the judges in the cases relied upon by Appellant, had no direct interest in the outcome of this case. In *Tumey v. Ohio*, 273 U.S. 510 (1927), conviction of the defendant would have directly increased the judge's income. Similarly, in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), conviction would have lessened the financial difficulty of running the village for which the judge/mayor was responsible. These were direct interests where disposition of the case *sub judice* would ineluctably have affected the interests of the judge.[23]

Instead, this case more closely resembles *Department of Energy v. Brimmer*, 673 F.2d 1287, 1294-95 (Temp. Emer. Ct. App. 1982), in which the district judge held stock in oil companies which were involved in the program at issue, but were not among the parties before him. The court held "that the judge does not have a direct economic or financial interest in the outcome of the

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insurance claim has been termed "merely a species of fraud," Dumas v. Southern Guar. Ins. Co., 408 So. 2d 86, 89 (Ala. 1981), the characterization of Appellant's conduct as "fraudulent" was a normal reference, rather than some convoluted effort to establish an additional cause of action.

[22] It is particularly noteworthy that Justice Embry, in his deposition in the Blue Cross case, indicated little, if any, knowledge of the theory of his case, stating "I gave all these facts that I knew to Mr. Rutledge [his attorney] and he represents me. His theory of law and all is what I'm travelling under. I don't have any independent thoughts about it." J.S. App. 192a.

[23] The facts in this case are even further from situations where the judicial and prosecutorial functions are combined, *see* Withrow v. Larkin, 421 U.S. 35 (1975); *In re* Murchison, 349 U.S. 133 (1955), or where an adjudicative body is established composed of members of a profession who have an inherent bias against competing professionals, *see* Gibson v. Berryhill, 411 U.S. 564 (1973).

case, and thus could hear it without contravening the constitutional requirements of due process." [24]

At the common law, judges could only be disqualified for a direct pecuniary interest in the case at bar. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609-10 (1947). Although the reasons for which judges are disqualified have grown, the core remains a direct interest in the outcome of the case. "To work a disqualification of the judge, 'the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely in the future from the general operation of law and government upon the status fixed by the decision.'" *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51, 56 (1946) (*quoting Piuser v. Sioux City*, 220 Iowa 308, 262 N.W. 551, 557 (1935)). In Alabama, "[t]he interest which will disqualify a judge must be *direct and immediate.*" *Webb v. Town of Eutaw*, 9 Ala. App. 474, 63 So. 687 (1913) (emphasis added). The legislative history of the present version of 28 U.S.C. § 455 also reflects a focus on direct economic interests. *See* H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6356.

The interest of Justice Embry here was at most remote and speculative, and not a direct interest. His participation was not in violation of even state standards and clearly did not deprive Appellant of due process.

C. There is No Evidence of Any Improper Bias Against Appellant

Justice Embry was also not disqualified for bias in light of his deposition testimony in the Blue Cross case. Read in context, this testimony shows no deep-seated prejudice against insurance companies. The focus of the

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[24] *See also* Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521, 523-24, *cert. denied*, 275 U.S. 571 (1927) (no disqualification where judge held stock in title insurance company not a party but insuring similar trust deeds); City of Valdosta v. Singleton, 197 Ga. 194, 28 S.E.2d 759, 763 (1944) (judge not disqualified because legal question may arise in litigation affecting him or his property).

deposition was several instances where Justice Embry or his late wife had had claims denied. In discussing one instance (J.S. App. 165a-66a), Justice Embry recounted Maryland Casualty's refusal to acknowledge the scheduled coverage of a mink coat, a claim which was promptly settled after he filed suit. *See supra* note 13. Immediately after the language cited by Appellant (Br. at 6), Justice Embry commented that once the suit "got their attention, they were very nice about it" (J.S. App. 166a), a comment which hardly reflects any persistent hostility. Indeed, after describing a difficulty with Blue Cross in 1968, the following colloquy occurred:

> "Q. Now, did you have any other difficulty with any type of hospital or medical insurance or health insurance claim?
>
> "A. Not with other companies, no.
>
> "Q. Never had any with any other company?
>
> "A. No."

(J.S. App. 176a). Whatever dispute Justice Embry had with Blue Cross (which Blue Cross conceded was justified), his deposition does not evince any views whatever with respect to Appellant.

Disqualifying bias must be "personal, i.e., directed against the party." *United States v. Carignan*, 600 F.2d 762, 763 (9th Cir. 1979). Further, "'[i]t is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally.'" *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (*quoting Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956)). Nothing in the record indicates that Justice Embry had such a personal bias against Appellant.[25]

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[25] Significantly, Justice Embry did rescue himself in a case decided within two weeks of the one at bar which involved Blue Cross. Blue Cross & Blue Shield of Alabama v. Granger, 461 So. 2d 1320, 1329 (Ala. 1984).

Further, the Supreme Court of Alabama has held that

> "Bias and prejudice must be shown by the conduct of the trial judge and may not be presumed or inferred by his subjective views . . . . Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice."

Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837, 841 (Ala. 1983) (citations omitted). Appellant wholly failed to meet its burden of establishing such bias.

Whatever general views Justice Embry had on the law of bad faith denial of insurance claims cannot rise to the level of disqualification. This Court in *FTC v. Cement Institute*, 333 U.S. at 702-03, held that

> "Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."

The D.C. Circuit also concluded that "[i]t is well established that the mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case." *Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980, 990 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985); *see also Laird v. Tatum*, 409 U.S. 824, 829-37 (1972) (Rehnquist, J.).[26]

Finally, Justice Embry's voting record belies the existence of any fixed prejudice against insurance companies. In 12 decisions involving bad faith denial of insurance claims during the period from the filing of the first suit Appellant complains of to the end of 1984, Justice Embry voted for the defendant insurance company in nine, including three cases in which the "directed verdict"

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[26] Indeed, the Commentary to the Standards Relating to Appellate Courts recognizes that an appellate judge's view on the law cannot form the basis of a request for recusal. See *supra* pp. 20-21.

standard which Appellant claims he was bent on overturning was found applicable.[27] Justice Embry's role in the deliberations of the Alabama court was not, therefore, in derogation of Appellant's right to due process. *A fortiori*, the same is true for the other justices of the Alabama court. The court's decision should consequently be affirmed.

IV. THE SUPREME COURT OF ALABAMA'S RECOGNITION OF THE BAD FAITH TORT DID NOT CONTRAVENE THE CONTRACT CLAUSE

For more than a century this Court's decisions have explicitly held that the Contract Clause of the federal Constitution is a limitation only on state legislative actions, not on decisions of state courts. This unbroken line of precedent repudiates Appellant's claim that its Contract Clause rights were violated by the Supreme Court of Alabama's recognition of the tort of bad faith denial of insurance claims.

A. This Court and Other Courts Consistently Have Held That the Contract Clause Does Not Apply to Judicial Action

This Court's most thorough examination of whether the Contract Clause applies to state judicial acts is in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924). There, a minor conveyed title to land to the Tidal Oil Company and, after attaining his majority, conveyed title to a second party. The holder of title through the second conveyance received a judgment in his favor to quiet

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[27] Bowers v. State Farm Mut. Auto. Ins. Co., 460 So. 2d 1288 (Ala. 1984); Watkins v. Life Ins. Co. of Georgia, 456 So. 2d 259 (Ala. 1984); Payne v. Nationwide Mut. Ins. Co., 456 So. 2d 34 (Ala. 1984); Armstrong v. Life Ins. Co. of Virginia, 454 So. 2d 1377 (Ala. 1984); National Sec. Fire & Cas. Co. v. Vintson, 454 So. 2d 942 (Ala. 1984); Gibson v. Fidelity & Cas. Co. of New York, 454 So. 2d 526 (Ala. 1984); Stewart v. State Farm Ins. Co., 454 So. 2d 513 (Ala. 1984) (opinion by Embry, J.); Dickey v. Alabama Farm Bureau Mut. Ins. Co., 447 So. 2d 693 (Ala. 1984); Garvin v. Shewbart, 442 So. 2d 80 (Ala. 1983). The decisions in *Payne*, *Armstrong* and *Vintson* applied the "directed verdict" standard.

title. The state supreme court affirmed, holding that the deed and agreements under which Tidal Oil claimed title were void because the conveyor was a minor. Tidal Oil claimed that the state supreme court's decision "changed a rule of property of the state upon the faith of which the deed, leases and other contracts set up by defendants were made, and thus impaired their obligation in violation of" the Contract Clause. *Id.* at 449.

In rejecting Tidal Oil's arguments, the Court unequivocally stated that

> "[i]t has been settled by a long line of decisions, that the provision of section 10, article 1, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts." *Id.* at 451 (footnote deleted).[28]

Noting that "[t]he language . . . plainly requires such a conclusion," the Court stated that contrary readings of the clause had resulted in "persistent error." *Id.* at 451.[29]

Decisions of this Court[30] and numerous other courts[31] presaged and have unwaveringly followed the *Tidal Oil*

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[28] The Court cited 19 of its decisions dating to 1847 which held that the Contract Clause applies only to legislative actions. 263 U.S. at 451 n.1.

[29] The appellant in *Tidal Oil* squarely presented the Court with a Contract Clause question: "The error[] here assigned [is] . . . that the Supreme Court of the State . . . impaired . . . [a contractual] obligation in violation of § 10, Article 1, of the Federal Constitution." 263 U.S. at 449. The Court's lengthy, detailed discussion of this point and its conclusion that the clause is not implicated by state court rulings conclusively refute Appellant's assertion (Br. at 30) that *Tidal Oil* did not decide the extent to which the Contract Clause applies to state judicial actions.

[30] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 260 (1953); Fleming v. Fleming, 264 U.S. 29, 31 (1924); Rooker v. Fidelity Trust Co., 261 U.S. 114, 118 (1923); Central Land Co. v. Laidley, 159 U.S. 103, 109 (1895); New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 30 (1888).

[31] *See, e.g.*, Frazier v. Lowndes Cty. Bd. of Education, 710 F.2d 1097, 1099 (5th Cir. 1983); Mariniello v. Shell Oil Co., 511 F.2d

interpretation of the Contract Clause. Appellant is unable to accurately cite a single case in which the Supreme Court has held the clause applicable to judicial rulings, thus demonstrating that its revisionist view of the clause is wholly unsupported and patently erroneous.[32]

B. Appellant's Historical Analysis Is Flawed and Ignores the Plain Language of the Contract Clause

Appellant argues that the framers should be found to have included "common law" in the definition of "Law" in article 10, section 1 of the Constitution. Br. at 31-34. This narrow focus on a single word ignores both the context of section 10 and the "occasion and general purpose of the contract clause," [33] which refute any suggestion that the clause reaches beyond legislative enactments.

Appellant is correct that language in the Ordinance for the Northwest Territory guaranteeing "security to *bona fide* private contracts was the immediate cause for the proposal of a similar clause in the Federal Convention," [34] but the Ordinance's language did not include "judicial creation of common law obligations." Br. at 3 n.7.[35]

853, 859 (3d Cir. 1975); Ruth v. Bituminous Cas. Corp., 427 F.2d 290, 293 (6th Cir. 1970).

[32] The American Council of Life Insurance, *et al.*, argue (Br. at 10 n.13) that the correct view is that of *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 220 (1864), which, they contend, found that a valid contract cannot be impaired by judicial action which interprets a statute. The *Tidal Oil* Court was well aware of, but not persuaded by, *Gelpcke*, citing it as a case "relied on to sustain the error" that judicial action could violate the Contract Clause. 263 U.S. at 451.

[33] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-428 (1934).

[34] B. Wright, Jr., *The Contract Clause of the Constitution* 8 (1938).

[35] The language in the Northwest Territory Ordinance to which Appellant refers, *i.e.*, that "no law ought ever to be made . . . that shall . . . interfere with or affect private contracts, or engagements *bona fide*," Art. II, 44 Stat. 1852 (pt. 1), was apparently inserted at the instigation of the Reverend Manassah Cutler, a lobbyist for the Ohio Company. *See* B. Wright, *supra*, at 7. The

Moreover, records of the Federal Convention of 1787 show that after debate on the Contract Clause, the language adopted was not that of the Northwest Ordinance, but John Rutledge's proposed wording, *i.e.*, "nor pass bills of attainder nor retrospective laws." B. Wright, *supra*, at 9. It is likely that Rutledge moved to associate these words with the Contract Clause to clarify, in response to a question by James Madison, that the clause was not redundant in light of the restriction on *ex post facto* laws. The latter applied only to acts of Congress, while the purpose of the Contract Clause was to restrict acts of state legislatures. *Id.* The verb—to "pass"—was in place from the clause's inception; it was not, as Appellant suggests (Br. at 36 n.11), inserted only as a later style change.[36]

In light of this history, the Court has correctly emphasized that the clause on its face, and in the context of article I, section 10, plainly states its limitations: "The language—'No state shall * * * *pass any* * * * *law* impairing the obligations of contracts'—plainly requires such a conclusion [that the Clause applies only to legislation]." *Tidal Oil*, 263 U.S. at 451 (emphasis in original).[37] Appellant's attempt to inflate the word

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Ohio Company was negotiating for the grant of a large tract of land within the Northwest Territory and was anxious that its transactions not be "interfered with by the territorial *legislatures* which were to be established under the Ordinance." *Id.* (emphasis added). Thus, the Ordinance was also directed at legislative action.

[36] In describing the clause in a letter to the governor of Connecticut, Roger Sherman and Oliver Ellsworth—two of the framers—stated: "The restraint *on the legislatures* of the several states respecting . . . impairing the obligation of contracts . . . was thought necessary as a security to commerce . . . ." (emphasis added) *quoted in* Hunting, *The Obligation of Contracts Clause of the United States Constitution* 113 (1919) (reprint 1976).

[37] *See also* Barrows v. Jackson, 346 U.S. at 260 (The "short answer . . . is that [the Contract Clause] . . . , as its terms indicate, is directed against legislative action only."); Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632, 638 (1912) ("[The Contract Clause], as its terms disclose, is not directed

"Law" to include the common law would simply delete the clause's operative word—"pass"—which clearly implies legislative action, not a judicial decision.

The Court has never construed the clause inconsistently with its language, nor doubted that the clause is limited by the framers' unambiguous intention that it be applied only to legislative action.[38] Even in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the principal case relied upon by Appellant, the Court was faced with a state statute, not a judicial ruling. Appellant has advanced no legitimate justification, nor is there any, for the unprecedented expansion of the clause which would be necessary for it to govern this case.[39] Appellant also has failed to develop objective, reliable, and administrable standards for distinguishing between judicial decisions which create law as opposed to those which simply interpret existing law. In these circumstances, the Court should entertain no doubts about adhering to two centuries of settled practice by affirming that the clause applies only to legislative action.[40]

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against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the State.").

[38] *E.g.*, United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 15 (1977); Home Bldg. & Loan Ass'n Blaisdell, 290 U.S. at 427.

[39] Appellant contends that the Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), is evidence that the word "Laws" in the Contract Clause includes "common law" decisions. In *Swift*, the Court held that the term "laws of the several states" in Section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 (*codified* at 28 U.S.C. § 1652), did not include state court rulings. *Erie* overruled, holding that the phrase includes "unwritten as well as written" laws. 304 U.S. at 72-73 & n.5. However, as Appellant itself points out, the historical flaws of *Swift* were well known to the court long before the *Blaisdell* and *Tidal Oil* decisions.

[40] Even assuming *arguendo* that the Contract Clause applies to state judicial action, it cannot benefit Appellant. By recognizing a new cause of action in tort, *see* Gulf Atlantic Life Ins. Co. v.

V. APPELLANT HAS NOT STATED A VALID CLAIM UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

A. The Eighth Amendment Does Not Apply to Civil Proceedings

This Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), held that the Eighth Amendment applies only in cases involving criminal sanctions. The Court stated that

> "[b]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."

Id. at 664. This holding was soundly based upon historical evidence that the Amendment was intended to be confined to criminal cases, and confirmed the Court's long-standing holding in *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833), that "[t]he eighth amend-

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Barnes, 405 So. 2d 916 (Ala. 1981); Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1 (Ala. 1981), the Supreme Court of Alabama in no way altered the terms of Appellant's contracts or increased its liability under these contracts. While requiring as a factual predicate the existence of a valid insurance contract between plaintiff and defendant, the tort of bad faith failure to pay a legally owed insurance claim is itself entirely extra-contractual. *See* Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368, 374 (1978). Moreover, as demonstrated in Argument VI *infra*, Appellant had ample advance notice of the adoption of the bad faith tort in Alabama, and has no legitimate reliance-based interest or other ground for challenging the punitive damage award. No credence can be accorded to Appellant's claim that it could not have anticipated the bad faith tort in 1967 when it first signed a contract to provide group health insurance for City of Mobile employees. Surely Appellant renegotiated its contract with the City at least annually, recalculating its rates each time based on all actuarial factors, including the possibility of damage awards. In these circumstances, the Supreme Court of Alabama cannot be found to have unconstitutionally impaired Appellant's contractual relations.

ment is addressed to courts of the United States exercising criminal jurisdiction." Because the punitive damages at issue here were imposed by a jury in a civil proceeding, Appellant cannot include itself within the embrace of the Eighth Amendment.

Appellant incorrectly cites *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality), and *In re Gault*, 387 U.S. 1 (1967), for the proposition that the Eighth Amendment is applicable to non-criminal cases. Br. at 40. In both of these cases the Court clearly indicated that it viewed the penalties reviewed as criminal punishments imposed in criminal proceedings. *Trop*, 356 U.S. at 99; *Gault*, 387 U.S. at 24, 36, 49 & 50. Moreover, *Gault* did not even involve an Eighth Amendment question.[41]

Appellant's attempt (Br. at 40-43) to quarry the history of Magna Carta's "excessive amercement" provision for evidence that the Eighth Amendment applies to civil proceedings is equally unavailing. Initially, the relevance of this discussion is obscure, given that Magna Carta predated the modern separation between civil and criminal proceedings. *See* 2 F. Pollock & F. Maitland, *The History of English Law* 447, 523-24 (2d ed. 1909). Further, under English practice at the time, amercements were distinguished from criminal fines. *Id.* at 516. Moreover, Appellant's historical research demonstrates no more than that fines were "a common *criminal sanction* in 13th-

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[41] Appellant patently mischaracterizes *Ingraham*, 430 U.S. at 669 n.37 and 671 n.40, as having cited *Trop* and *Gault* to be "examples of punishment administered in non-criminal proceedings to which the Eighth Amendment is applicable." Br. at 40. In note 37, while the Court noted that the state in *Gault* had not explicitly labelled a delinquency proceeding as "criminal," it plainly rejected this assessment by stating that incarceration of juveniles is analogous to a criminal punishment. In note 40, the Court stated that *Trop* held denationalization to be "an impermissible punishment for wartime desertion . . . established at a criminal trial." It is difficult to construct any interpretation of this statement which supports Appellant's claim that the *Ingraham* Court would apply the Eighth Amendment to non-criminal proceedings.

Century England." *Br.* at 42 (*quoting Solem v. Helm*, 463 U.S. 277, 284 n.8 (1983) (emphasis added)). This statement rather obviously supports, not undermines, the long-standing principle that the scope of the Eighth Amendment does not extend beyond criminal proceedings. Appellant also has failed in any way to contradict the evidence correctly adduced by the Court in *Ingraham*, 430 U.S. at 664-668, as direct support for its decision reaffirming that the Eighth Amendment applies only in criminal cases.

B. The Punitive Damages Assessed Against Appellant Are Not a Criminal Penalty Subject to the Eighth Amendment

Appellant seeks to shoehorn this case into the Eighth Amendment by arguing that punitive damages should be regarded as the functional equivalent of a criminal penalty. Br. at 39-40. This argument cannot alter the fact that the Alabama judicial system indisputably employed civil rather than criminal procedures to impose punitive damages upon Appellant for its tortious conduct. Because Eighth Amendment scrutiny is inappropriate unless the state has in fact utilized criminal procedures, the question before this Court is not whether the punitive damage award against Appellant comports with the Eighth Amendment, but whether Alabama was required under the Due Process Clause to accord Appellant criminal-type procedures. *Ingraham*, 430 U.S. at 671 n.40.

Despite its rhetorical complaint that Appellees' civil action lacked the safeguards of a criminal proceeding, Br. at 49, Appellant has not identified a single criminal procedure required by the Constitution which it believes Alabama erroneously failed to provide. The only protection which Appellant could even argue it did not receive is the standard requiring proof beyond a reasonable doubt. Yet this Court's precedents plainly demonstrate that the weighted reasonable doubt standard is required only for those exceptional cases, such as criminal proceedings, which involve personal interests of transcendent constitu-

tional value.[42] By contrast, Appellant's liability was limited to a money judgment which does not warrant and cannot justify invoking the reasonable doubt standard.[43]

Appellant has failed to present this Court with any cogent reason for regarding punitive damages as criminal in nature. Punitive damages for tortious or other unlawful conduct have been imposed as civil penalties, not criminal punishment, in England and in the United States by both federal and state courts for over two centuries. This Court itself has on numerous occasions upheld or otherwise ruled upon punitive damage awards and other penalties imposed in civil proceedings without once indicating, much less holding, that criminal procedures should have been followed.[44] There are at least 19 federal statutory

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[42] The Court has limited this standard to criminal cases, including juvenile delinquency proceedings as in *Gault*, on the grounds that

> "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."

In re Winship, 397 U.S. 358, 363 (1970). The judgment rendered against Appellant, however, did not result in criminal stigmatization or the loss of any party's personal liberty through incarceration.

[43] *See* Santosky v. Kramer, 455 U.S. 745, 755 (1982) ("while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' ") (*quoting* Addington v. Texas, 441 U.S. 418, 423 (1979)).

[44] This Court has recognized explicitly that punitive damages are customarily imposed as a civil penalty. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (punitive damages found to be "private fines levied by civil juries"). In *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 460 n.15 (1977), the Court specifically recognized that legislatures have the power to impose civil rather than criminal fines. These and similar cases amply reveal that, while all criminal offenses may be punished by fines, not all fines are punishments for criminal offenses.

provisions which authorize the imposition of punitive damages in a civil proceeding,[45] and at least 21 others which authorize treble damages as a civil penalty.[46] Presumably these and other federal statutory provisions authorizing civil penalties against private parties—as well as numerous state statutes and common law rules providing for similar civil sanctions—would be rendered unconstitutional if two centuries of practice are reversed by holding that punitive damages cannot be imposed in civil proceedings.

Appellant nevertheless argues that punitive damages must be regarded as criminal in nature because they serve two purposes of criminal law by punishing a party for oppressive conduct and deterring that party and others similarly situated from committing equally reprehensible conduct in the future. Br. at 39. This contention is flatly contradicted by the holding in *Ingraham* that the corporal disciplinary action there at issue, which served both to punish and to deter, was not a criminal penalty governed by the Eighth Amendment.[47] The Court

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[45] *See* 11 U.S.C. § 303(i)(2)(B); 11 U.S.C. § 362(h); 11 U.S.C. § 363(n); 12 U.S.C. § 1723a(e); 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 298(c); 15 U.S.C. § 1116(d)(11); 15 U.S.C. § 1681n(2); 15 U.S.C. § 1691e(b); 26 U.S.C. § 7431(c)(1)(B)(ii); 33 U.S.C. § 1514(c); 42 U.S.C. § 3612(c); 42 U.S.C. § 9607(c)(3); 45 U.S.C. § 831(j); 49 U.S.C. § 1679b(a)(1); 49 U.S.C. § 1810(a); 49 U.S.C. § 2008(a)(1); and 50 U.S.C. § 1810(b).

[46] *See* 7 U.S.C. § 2564(b); 12 U.S.C. § 1464(q)(3); 12 U.S.C. § 1975; 12 U.S.C. § 2607(d)(2); 12 U.S.C. § 2608(b); 15 U.S.C. § 15(a); 15 U.S.C. § 15c(a)(2); 15 U.S.C. § 72; 15 U.S.C. § 78u(d)(2)(A); 15 U.S.C. § 1117(a); 15 U.S.C. § 1117(b); 15 U.S.C. § 1693f(e); 15 U.S.C. § 1989(a)(1); 22 U.S.C. § 4209; 30 U.S.C. § 689(b); 35 U.S.C. § 284; 45 U.S.C. § 83; 46 App. U.S.C. § 1227; 46 U.S.C. § 10711; 47 U.S.C. § 503(a); and 49 U.S.C. § 11902.

[47] Treble damages, like punitive damages, serve both to punish and to deter. *See* American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 575 (1982). Under Appellant's reasoning which focuses upon these two objectives, treble damages could not continue to be regarded as civil if punitive damages are reclassified as criminal.

stated that "[a]lthough an imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply, the Court has never held that *all* punishments are subject to Eighth Amendment scrutiny." 430 U.S. at 670 n.39 (emphasis in original). Because punitive damages have historically been regarded as a civil penalty, and are not imposed in proceedings which bear the attributes of criminal law by subjecting the wrongdoer to stigmatization or possible imprisonment, they do not constitute a criminal penalty subject to the Eighth Amendment or other constitutionally-mandated criminal procedures.[48] The Court would only subject itself to a veritable flood of appeals seeking to relitigate civil penalties assessed by both federal and state courts if it finds punitive damages to be criminal sanctions reviewable under the Eighth Amendment.[49]

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[48] The body of case law headed by this Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is not to the contrary. These cases have examined in various contexts whether penalties imposed by federal statutes are criminal or civil. In *United States v. Ward*, 448 U.S. 242, 248-54 (1980), the Court held that a monetary fine intended by Congress to be a civil penalty did not function as a criminal punishment, even where the underlying conduct was a criminal offense. In other cases, and in *Kennedy*, the Court has generally focused upon whether the penalty reveals a "punitive design" by imposing a drastic personal deprivation, such as imprisonment, denationalization, or deportation, in the manner of a criminal sanction without any absolving remedial purpose. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 617 (1960). Here Alabama has imposed a monetary penalty, not a drastic personal deprivation, for conduct which is not per se regarded as a criminal offense in Alabama. Moreover, this penalty does not function in the manner of a criminal sanction because it does not result in stigmatization or imprisonment, and it serves legitimate non-punitive objectives by compensating plaintiffs for actual injuries and providing an incentive for persons to file civil suits against insurance companies for tortious misconduct which might otherwise go unremedied.

[49] The Court in *Ingraham*, 430 U.S. at 670 n.39, rejected the proposition that "the judgment of which disciplinary punishments are reasonable and which are excessive [is] a matter of constitutional principle in every case, to be decided ultimately by this Court."

C. The Punitive Damages Assessed Against Appellant Are Not Excessive

Assuming *arguendo* that punitive damages are subject to Eighth Amendment scrutiny, the $3.5 million assessment against Appellant does not violate the Excessive Fines Clause. The only argument which Appellant is able to muster against the amount of the award is that it bears a mathematical relationship to Appellees' actual damages on the insurance claim which Appellant deems to be unreasonable. Br. at 44-46. This argument is not only incorrect on the law, it is beside the point because it constructs an artificial comparison between two unrelated figures which entirely ignores the purpose of punitive damages.

Simply put, the mathematical ratio between a penalty and the victim's monetary recovery is irrelevant under the Eighth Amendment. The Amendment's focus is solely upon whether the penalty is disproportionate to the severity of the misconduct. *Solem v. Helm*, 463 U.S. at 284. In punitive damage cases as well, this Court consistently has recognized that the ratio between punitive and actual damages is of no consequence.[50] In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), the Court stated that

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[50] It is immaterial that some state and federal statutes or rules impose specific monetary limitations on civil penalties, or require the award to bear some proportion to actual damages in certain circumstances. These varying approaches demonstrate simply that Congress and the states have utilized their broad policy-making discretion in this area by adopting several different approaches in various legal and factual contexts. Indeed, the wide variety of approaches adopted reveals that the decision as to which approach is suitable for a particular situation under state law is a policy determination best left to state courts and legislatures. Moreover, at least one of the statutory provisions cited by *amici*, if applied in this case, could have resulted in a larger award for Appellees. The Montana statute noted with approval in the Brief of American Insurance Association, *et al.*, at 23 n.24, authorizes an award equal to 1% of the defendant's net worth, which in this case could have resulted in punitive damages against Appellant of approximately $43 million. *See* Directory of Corporate Affiliations 15 (1985).

> "[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff."

In *Massachusetts Bonding & Insurance Co. v. United States*, 352 U.S. 128, 133 (1956), the Court emphasized that "[b]y definition, punitive damages are based upon the degree of the defendant's culpability," and specifically recognized the propriety of large punitive damage awards "[w]here the degree of fault is high, but the pecuniary injury slight." Appellant has not even attempted to demonstrate, nor can it, that the punitive damages assessed against it are excessive compared to the nature and severity of its misconduct.[51]

The punitive damage award against Appellant manifestly serves, and in turn is justified by, the historic purposes of punitive damages in civil cases to punish the wrongdoer and to deter that party and others from engaging in the same conduct in the future. Especially when the defendant has substantial economic resources, the award must be sufficiently large to have the desired admonitory and behavioral impact.[52] Appellant is a nation-

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[51] Even if a comparison of punitive and actual damages was relevant, the appropriate measure of Appellees' actual damages would be the injury caused by Appellant's tortious conduct, not its liability on the contract claim. However, Appellant has not even attempted to estimate the harm inflicted upon Appellees in the form of humiliation, emotional stress, aggravation, and financial insecurity, much less demonstrated that the punitive damages award is excessive when compared to the monetary judgment necessary to compensate these injuries adequately.

[52] *See* W. Shernoff, S. Gage & H. Levine, *Insurance Bad Faith Litigation* § 8.06[2] at 8-20 (1984) ("'the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective'") (*quoting* Bertero v. National General Corp., 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608, 724 (1974)).

wide insurance company which possesses tremendous economic leverage over the persons it insures, many of whom lack the resources, sophistication and endurance to contest or even detect unlawful claim denials. These parties often, as here, have no role in selecting their insurance company or in negotiating the terms of the policy. The insurance company's already enormous leverage is only enhanced when its employees lie to insureds regarding the consideration afforded their claim while knowingly failing to process that claim in compliance with the company's own procedures, perhaps the only significant protection must insureds have against arbitrary and peremptory treatment by claim examiners. An award of $3.5 million represents a reasonable estimate by the jury of the amount of punitive damages necessary to punish Appellant and to deter insurance companies from using their immense resources and economic leverage to engage in this type of gross misconduct against a vulnerable class of insureds.

A punitive damage award of this size is particularly appropriate when an organization engages in intentional misconduct with respect to a situation it routinely encounters in large numbers on a day-to-day basis due to the inherent danger and likely possibility that this misconduct is more widespread. In this case, it strains credulity to suppose that the knowing misrepresentations and failure to adhere to basic company procedures perpetrated over an extended period of time by numerous decision-making personnel constitute aberrant behavior limited solely to Appellees' claims. Moreover, the remark by claim examiner Hutton at Appellant's Home Office—that he might reconsider his decision to deny the claim if it appeared the Lavoies were likely to file suit—plainly reveals a predisposition for according adverse, discriminatory treatment to the claims of insureds over whom Appellant undoubtedly has the greatest leverage. A substantial punitive damage award mitigates the financial incentive which an insurance company undeniably has to engage in unreasonable claims practices for the large num-

ber of small claims it processes daily. *See Insurance Bad Faith Litigation* § 8.06[5] at 8-23.

Punitive damages also provide a necessary incentive for private parties to institute lawsuits to recover unlawfully denied claims when, as here, the amount in dispute appears to be substantially less than the costs and legal fees required to prosecute the litigation. This purpose of punitive damages is of ancient vintage, *e.g.*, C. McCormick, *Law of Damages* § 77 at 276-77 (1935), and mitigates the harsh effects of the American Rule under which successful litigants are required to bear their own litigation expenses. It applies with special force to this case in light of Appellant's prolonged civil litigation, involving fabricated testimony by Appellant's personnel to cover up their misconduct, over a modest claim which Appellant knew had been unlawfully denied on four separate occasions and the recovery upon which would not cover plaintiffs' costs and legal fees. Without the specter of substantial punitive damages for intentional misconduct, Appellant and other insurance companies will be free to deny many valid insurance claims with virtual impunity.[53]

Punitive damages also serve as compensation for plaintiffs' injuries. In *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981), the Supreme Court of Alabama specifically recognized that punitive damages for an insurance company's bad faith failure to pay a legally-owed claim "may include mental distress and economic loss." Here, Appellees did not receive any damages specifically designated as compensation for the humiliation, emotional strain, aggravation, and financial insecurity caused by Appellant's gross misconduct, thus

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[53] Appellant's suggestion that double or triple damages are an adequate penalty, Br. at 45, cannot be taken seriously. For a nationwide insurance company such as Appellant, the risk of occasional double or triple recoveries for small claims, such as Appellees' claim for $1,650.22, is precisely the type of liability exposure it is willing to accept without changing its deficient claims practices in any respect. *See Walker v. Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497, 499 (1961).

making it likely that a substantial portion of the $3.5 million judgment represents compensation for these injuries. The dual compensatory and punitive aspects of Appellees' judgment only confirm the absence of any grounds for finding this award to be excessive.

Appellees' punitive damage award was reviewed, and upheld as not excessive, by the trial judge who heard the evidence and by the Supreme Court of Alabama. As a civil judgment, this award does not represent a liability unusually large in amount under modern standards, nor will it be financially oppressive for Appellant to pay. The award has been set at an amount which plainly serves the purposes of punitive damages to punish the defendant, deter future wrongdoing, compensate plaintiffs for actual injuries, and provide an incentive for parties to contest insurance companies' intentional misconduct. Appellant has suggested no criteria by which to measure putatively excessive awards other than the standard already employed by the Alabama courts, nor has it advanced any legitimate reason for this Court to oust state courts from their traditional role as the sole judicial bodies with responsibility for reviewing the alleged excessiveness of jury punitive damage awards in state cases.

VI. PUNITIVE DAMAGES WERE NOT ASSESSED AGAINST APPELLANT IN VIOLATION OF DUE PROCESS

At bottom, Appellant's undifferentiated attack on punitive damages, purportedly on due process grounds, Br. at 46-49, is little more than an attempt to transform this appeal into a general forum for debating the merits of punitive damages. This attempt must fail, as similar efforts have in the past, on the basis of a uniform line of precedent upholding in principle the lawfulness of punitive damage awards.[54] In *Day v. Woodworth*, 54 U.S. at

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[54] Various *amici* seek to have this Court address the "social and policy ramifications" of punitive damage awards by civil juries, *e.g.*, Brief of Southeastern Legal Foundation, Inc. at 5, which are asserted to be excessive in both number and amount. What these

371, the Court upheld a punitive damage assessment, stating

> "[w]e are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

In *The Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 492, 493 (1876), the Court reiterated that "the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be recovered," and that the practice of awarding punitive damages "has received the sanction of this court." These cases, and numerous others like them,[55] unambiguously repudiate Ap-

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parties recognize only cursorily, or fail to acknowledge at all, is that punitive damage awards by civil juries often have been eliminated or substantially reduced as excessive by state and federal courts employing the same traditional standards of review which Appellant attacks here. Indeed, in *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d at 926, the Supreme Court of Alabama reduced from $1.1 million to $100,000 an award against an insurance company found liable under the bad faith tort when the circumstances of that case showed the award to be excessive. Moreover, *amici's* call for more stringent controls on civil penalties raises complex factual and policy issues over a broad range of substantive areas which are properly the concern of state legislatures or Congress, not this Court. While Appellant and *amici* repeatedly seek to invoke the Due Process Clause to aid their cause, it would fundamentally violate Appellees' due process rights to have their case decided not on its own merits and facts, but by reference to statistical or tabular compilations of selected cases in other jurisdictions involving other areas of law which may or may not have involved unjustified punitive damage awards.

[55] A plurality of the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967), stated that "the Constitution presents no general bar to the assessment of punitive damages in a civil case." The Court later recognized that "[p]unitive damages are 'a particular remedial mechanism normally available in the federal courts'" in *Carlson v. Green*, 446 U.S. 14, 22 (1980) (*quoting* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971)). In *Smith v. Wade*, 461 U.S. 30, 35 (1983), the Court reaffirmed the availability of punitive damage awards under 42

pellant's contention that punitive damage awards violate due process.

Appellant (Br. at 48) nevertheless maintains that its due process rights have been infringed by the Supreme Court of Alabama's purported failure to promulgate "any articulated substantive rule of conduct." However, it is well established that a civil rule of law affecting no fundamental right can be held invalid for vagueness under the Due Process Clause only in those rare cases where it exacts "obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). The defendant-favoring legal and evidentiary rules adopted by the Supreme Court of Alabama to govern this cause of action, and its use of punitive damage standards traditionally employed by both federal and state courts to measure and review plaintiffs' awards,[56] cannot under any responsible interpretation be regarded as the complete absence of substantive rules or standards.[57] To hold otherwise would lead to a

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U.S.C. § 1983, holding that the validity of punitive damages is "accepted as settled law by nearly all state and federal courts, including this Court." The Court recently upheld a state's authority to impose punitive damages in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), recognizing that "[p]unitive damages have long been a part of traditional state tort law."

[56] These standards are set forth in the Supreme Court of Alabama's numerous decisions construing the bad faith tort. *See, e.g.*, National Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982); National Savings Life Ins. Co. v. Dutton, 419 So. 2d at 1362. Since the *Chavers* decision in 1981, the Supreme Court of Alabama has considered more than 30 cases involving the bad faith tort. Including the case at bar, bad faith actually was found in only four cases.

[57] If Appellant's complaint is that Alabama's punitive damage doctrine does not remove all possibility of an erroneous judgment, this complaint must be denied under the well established rule that "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as

drastic and absurd result by literally eviscerating state tort law and numerous federal statutory provisions utilizing similar standards.[58]

Appellant also challenges the award under the Due Process Clause by claiming that it did not have fair notice that liability could result from the manner in which it processed the Lavoies' claim. Br. at 48.[59] What Appellant ignores, of course, is that the tort of bad faith failure to pay a legally-owed insurance claim is merely a "species of fraud," *Dumas v. Southern Guaranty Insurance Co.*, 408 So. 2d at 89, and that fraud traditonally has been the grounds for compensatory and punitive damages in Alabama, *e.g.*, *Old Southern Life Insurance Co. v. Woodall*, 295 Ala. 235, 326 So. 2d 726, 732 (1976). Appellant cannot seriously contend that it reasonably and

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to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations." Mackey v. Montrym, 443 U.S. 1, 13 (1979).

[58] *See* Martinez v. California, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"); Green v. State Farm Fire And Cas. Co., 667 F.2d 22, 24 (9th Cir. 1982) (dismissing due process claim against punitive damage award as "border[ing] upon the frivolous").

[59] Appellant's additional argument (Br. at 49) that punitive damages advance "no legitimate state interest" is absurd on its face. As demonstrated at pp. 39-43 *supra*, Appellees' award serves several important state interests. The futility of Appellant's due process claim is further illustrated by its shrill rejection of the proposition that "the retrospective application of new rules to historic conduct could have any deterrent effect." Br. at 47. What Appellant views as "plainly irrational," *id.*, could hardly be more self-evident. The punitive damages assessed against Appellant for its gross misconduct will serve as an undeniable warning for Appellant and other insurance companies not to engage in this type of outrageous behavior in the future. Indeed, it is self-contradictory for Appellant to complain about the chilling effect of this punitive damage award, Br. at 48, while claiming that the award does not act as a deterrent.

legitimately believed that the Due Process Clause gave it a license until 1981 to injure its insureds through intentional misconduct—involving knowing misrepresentations, repeated and knowing failures to follow its own procedures, and knowingly false testimony under oath as part of a cover-up attempt—without being subject to liability therefor. It has been established in Alabama for at least three decades that insurance companies owe a legal duty of good faith and fair dealing to their insureds.[60] Appellant cannot have been unaware of this duty, nor can it seriously contend that it believed its outrageous treatment of Appellees even minimally comported with it.

Appellant also could not have been unaware of the development of the bad faith tort in other states in the early 1970's, and the resulting potential for this tort to be recognized in Alabama, as it ultimately was in 1981.[61] This process, by which a common law cause of action first germinates in one or more states and then gains a nationwide scope through formal adoption on a state-by-state basis, is not unlike the deliberative process which precedes enactment of federal legislation. Just as parties have been found to possess "ample advance notice" of federal legislation applied retroactively to cover the time period during which it was under discussion before Congress, *see United States v. Darusmont*, 449 U.S. 292, 299 (1981) (per curiam), so Appellant had sufficient notice

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[60] *See* Waters v. American Cas. Co., 261 Ala. 252, 73 So. 2d 524 (1953) (per curiam) (recognizing tort for insurance company's failure to satisfy its legal duty of good faith and fair dealing in third party context). This obligation has its origins in the "implied in law duty of good faith and fair dealing" which has been recognized at least since 1939 as inherent in every contract. *See* Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d at 6.

[61] California was the first state to recognize this tort. *See* Fletcher v. Western Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). Other states followed California's lead soon after. *See, e.g.*, Amsden v. Grinnell Mut. Reins. Co., 203 N.W.2d 252 (Iowa 1972); Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974); Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (1976).

that its misconduct could result in tort liability.[62] Appellant should not be permitted to take advantage of the interval between this tort's initial emergence and its subsequent adoption in Alabama by engaging in deliberate misconduct up until the moment of formal recognition. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709, 2719 (1984).

Appellant itself was a defendant in *Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973), one of the earliest cases recognizing the tort. In response to *Gruenberg* and similar cases, a plethora of law review, insurance journal, and magazine articles brought national attention to this emerging tort,[63] often with constructive recommendations for claims practices by which insurance companies could minimize their liability exposure. Some of these articles advised Appellant and other insurance companies that liability could be avoided without undue effort simply by conducting a thorough investigation before acting upon the claim, resolving legitimate doubts in favor of the insured, avoiding deceptive practices, and paying lawful claims promptly.[64] Had Appellant followed these simple guide-

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[62] Nor can Appellant reasonably claim that it processed Appellees' claim in reliance upon a rule of law stating that it could not be held liable in tort for bad faith. In *Childs v. Mississippi Valley Title Ins. Co.*, 359 So. 2d 1146, 1152 (Ala. 1978), the Supreme Court of Alabama specifically recognized that it had never at any time in the past "rejected first party bad faith tort actions against an insurer." In *Vincent v. Blue Cross-Blue Shield of Alabama, Inc.*, 373 So. 2d 1054, 1056 (Ala. 1979), the court again emphasized that up to that point it had neither recognized nor rejected the bad faith tort. Both of these decisions were issued before this case went to trial and before much of Appellant's egregious misconduct occurred.

[63] Many of these articles are collected in Levine, *Demonstrating and Preserving The Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 620 n.52 (1979).

[64] *See, e.g.*, Houser & Knoll, *Claim Handling and Bad Faith Claims—The Hazards of Saying "No,"* 15 For the Defense 93 (1974); Raymont, *Punitive Damages In Property Insurance Claims,*

lines here, it would not have been held liable for punitive damages.

The tort of an insurance company's bad faith failure to pay a claim has developed in Alabama according to the traditional case-by-case adjudication of the common law. The Court has never declared this common law technique to be in any way antithetical to the Due Process Clause. To the contrary, the Court in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), implicitly upheld the lawfulness of the common law method. There the Court recognized that when a state statute imposes a legal duty without explicitly creating a liability, a remedy at common law may lawfully be imposed by state courts in the first instance. *Id.* at 312 n.8. By establishing a remedy at common law for an insurance company's tortious misconduct in violation of its pre-existing legal duty of good faith and fair dealing toward its insureds, the Supreme Court of Alabama engaged in the same common law function practiced in the United States for over two centuries which was accepted by this Court in *Donaldson*.[65] For this reason and the reasons stated above, Appellant has failed to meet its heavy burden of proof to demonstrate that the rule's impact is manifestly "harsh and oppressive" in violation of the Due Process Clause. *Welch v. Henry*, 305 U.S. 134, 147 (1938).[66]

Best's Rev. (Prop./Liab.), July 1975, at 30; Wier, *Liability Exposures in Tort Growing Out of Breach of Insurance Contracts*, Best's Rev. (Prop./Liab.), Oct. 1975, at 32.

[65] In addition, Appellant operates in a highly regulated field with unique public interest considerations. *See, e.g.*, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 414 (1914). Given the nature of its business, Appellant can hardly object to judicial action which refines the extensive regulatory regime to which it already is subject. *See* FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940).

[66] Appellant also relies upon dictum in *Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 17 (1976), that laws which seek to deter normally should not be applied retrospectively. Br. at 49. This statement cannot apply to Appellees' award, which serves legiti-

Incredibly, Appellant claims that this Court should review punitive damage awards under the Due Process Clause to prevent unnecessary litigation and the chilling of desirable conduct. Br. at 48. The only unnecessary litigation on the horizon is this appeal and the flood of similar appeals which inevitably will engulf this Court if punitive damage awards are for the first time subjected to review on the merits under the Due Process Clause. Moreover, it cannot seriously be contended that the intentional mistreatment of insureds which will be deterred by this award qualifies as desirable conduct. This Court has been concerned about the chilling effect of punitive damage awards only in the context of First Amendment activities, *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944 (1985), or the proper functioning of government officials, *see Smith v. Wade*, 461 U.S. at 88 (Rehnquist, J., dissenting). Appellant fails to qualify on either score.

CONCLUSION

The record shows that Appellant engaged in egregious misconduct towards its own insureds and then fomented efforts to cover up its errors. Failing that, in a desperate attempt to avoid liability, it belatedly concocted a series of constitutional claims, including an attack on the integrity of the Supreme Court of Alabama. For the reasons discussed above, these efforts come too late, and this case should be dismissed. In any event, neither Appellant's procedural nor substantive rights were violated by the decision on appeal and, if the Court should consider the merits, the judgment of the Supreme Court of Alabama should be affirmed.

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mate public purposes beyond punishment and deterrence. *See supra* pp. 39-43. Moreover, the Court in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 104 S. Ct. at 2718, held that a retrospective measure will be upheld if it promotes a "legitimate legislative purpose" by "rational means." Appellees' award is valid under this standard as an effective mechanism for detecting, preventing and redressing abuses in the claims practices of insurance companies.

Respectfully submitted,

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September 27, 1985

APPENDIX

APPENDIX

IN THE CIRCUIT COURT
FOR THE TENTH JUDICAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

Civil Action No. CV 84-500-447-JDC

T. ERIC EMBRY,
Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,
Defendant.

[Filed April 16, 1985]

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby, dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the 16 day of April, 1985.

/s/ Jack D. Carl
Circuit Judge

IN THE CIRCUIT COURT
FOR THE TENTH JUDICAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

Civil Action No. CV 84-500-447-JDC

T. ERIC EMBRY,
Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,
Defendant.

[Filed April 16, 1985]

STIPULATION FOR DISMISSAL

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a)(1) of the Alabama Rules of Civil Procedure, hereby stipulated that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for and intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates

and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the 12 day of April, 1985.

T. ERIC EMBRY

By: W. E. Rutledge
W. EUGENE RUTLEDGE
As His Attorney

BLUE CROSS AND BLUE SHIELD OF ALABAMA

By: William G. Somerville, Jr.
WILLIAM G. SOMERVILLE, JR.
As Its Attorney

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN EQUITY

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, the undersigned, as Register of the Circuit Court, Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing contains a full, true and correct copy of the instrument herewith set out as appears of record in said Court.

Witness my hand and seal of said Court, this the 29th day of August, 1985.

/s/ Douglas L. Cockrell
Register

By: C. Houtz
Deputy Register